No. 79-1540

Supreme Court, U.S.
FILED
JUN 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD SADLOWSKI, *et al.*,
Plaintiffs-Petitioners

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant-Respondent

and

UNITED STEELWORKERS OF AMERICA,
Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
MARY M. LEVY
RAUH, SILARD AND LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

Attorneys for
Plaintiffs-Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1540

EDWARD SADLOWSKI, *et al.*,
Plaintiffs-Petitioners

v.

F. RAY MARSHALL, Secretary of Labor,
Defendant-Respondent

and

UNITED STEELWORKERS OF AMERICA,
Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Respondents' oppositions are a studied exercise in avoidance both of petitioners' facts and of their arguments.

1. The Secretary's Flawed "Statement of Reasons"

The petition shows that the Secretary's Statement of Reasons for refusing to bring suit to upset the election was arbitrary and capricious on its face, but the Govern-

ment responds with a mere conclusory denial (Opp. at 7), and nowhere answers petitioners' major point—that the District Court failed even to mention seven of plaintiffs' eight examples of arbitrariness and simply copied the Government's answer to the eighth:

(i) There is no answer to our showing that even thought violations in 16% of the locals in the United States reduced the McBride margin over Sadlowski by roughly 40% and Montgomery's by over 90%, the Statement of Reasons never explained why the Secretary made no further investigation in the United States during the three-month waiting period for the results of the Canadian "investigation."

(ii) There still remains only deliberate ambiguity on a controlling aspect of the election and the Secretary's decision not to sue: Did the Secretary rely on the Tremblay report in Canada or did he not? See *infra*, pp. 5-6.

(iii) To petitioners' charge that the Secretary should have analyzed the case in terms of the Montgomery contest (where even the Department's inadequate investigation eliminated over 90% of the margin), the Government has no answer, either here or in the Secretary's Statement of Reasons.

(iv) Petitioners' contention that it was arbitrary and capricious to treat denials of the right to vote in secret differently from denials of the right to vote at all is met only with the Government's concession (Opp. at 6, n. 5) that "the decision below . . . departs from the district court's analysis in *Bachowski* v. *Brennan*, 413 F. Supp. 147 (W.D. Pa.), appeal dismissed, 545 F.2d 363 (3d Cir. 1976)."

(v) Petitioners cite as a classic Catch 22 situation the Secretary's reasoning that the denial of Sadlowski observers is immaterial "if the investigation disclosed that the election was otherwise properly conducted" (Pet. at 18). The Government does not answer.

(vi) Petitioners contend that it was inconsistent for the Secretary, on the one hand, to find a "concerted effort to try to intimidate and abuse those who supported Sadlowski" which was widely publicized and, on the other hand, to find that this could not have any effect on the outcome of the election (Pet. at 19). Again no answer by the Government is forthcoming.

(vii) To petitioners' contention concerning extensive illegal USWA staff activity on behalf of the McBride slate, the Statement of Reasons argues that "distinctions between union time and personal time are difficult to make," that "Staff Representatives for the most part have no set hours" and therefore the Secretary cannot find that the staff campaigning "may have affected the outcome" of the election. The Government makes no response to petitioners' showing (Pet. at 20) that this in effect reads the statutory prohibition against illegal staff activity out of the statute.

(viii) Petitioners contend that once substantial violations were found by the Secretary, the burden of proof should have shifted to the union to demonstrate the violations did not affect the outcome of the election (Pet. at 20-21). The Government replies that this is only true once suit is brought (Opp. at 6-7, n. 6), but gives no reason for such a distinction.[1]

(ix) As to the relationship between the Labor Department and USWA lawyers, which further colors Department inaction in a case involving the leadership of a major national union, the Government does not deny that Solicitor of Labor Clauss (whose name appears on the Government brief in opposition) did exactly what the petition accuses her of doing. She reversed the Department's pre-

---

[1] *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 472 (1968) merely emphasizes the desirability of unions' resolving election complaints internally.

viously neutral position on the right of an intervenor in a successful suit to upset a union election to obtain attorneys' fees from the Union and at the request of USWA counsel wrote him a letter (unbeknownst to the Solicitor General) supporting the Union's petition for certiorari in this Court opposing attorneys' fees. That letter, after editing by USWA counsel, was filed by him with this Court. This process began before the Secretary's decision in this case, and took place while USWA counsel was an active member of the screening committee considering Solicitor Clauss' nomination for a federal judgeship. After Bar Association representatives informed the Attorney General of these facts, Clauss withdrew from consideration for appointment. USWA says only (Opp. at 4) that "with respect to the incident in question . . . no impropriety occurred," without deigning to explain, deny, or justify the actions taken.

(x) Neither respondent answers petitioners' background material regarding incumbent self-perpetuation and stolen elections in USWA. The Government says nothing, and USWA itself, although contending that the Official Family is "mythical" (Opp. at 4), nowhere challenges that the words and description are those of USWA President Abel, who detailed how the Official Family ran the union and how members should not go outside the Union for any purpose, even to correct fraud (Pet. at 4). The Official Family cannot, of course, deny its most recent action to perpetuate itself, through rules denying reformers outside assistance while permitting union staff to provide full financial and other support for the incumbents to whom they are beholden (Pet. at 5).

2. The Secretary's Failure to Investigate

Petitioners contend (Pet. at 11-13) that the Secretary failed to make a full, reasonable and proper investigation of the election either in Canada or the United

States. The Government's opposition illuminates rather than answers this failure.

Thus, in the petition we state that "It is impossible to determine even today what the Secretary's position is on this Canadian investigation" (at 11). As we pointed out in the petition (at 11-12), "The Statement of Reasons uses studied ambiguity—'Nothing in Mr. Tremblay's Report affects those conclusions' (J.A. 145)—which can mean either he did or he did not rely on the Tremblay investigation. Then the Department changed its position; a month later, on December 12, 1977, the Solicitor of Labor wrote plaintiffs' attorneys that '. . . it must be clear to you that we did not rely on the Canadian report in reaching the decision to close the case' (J.A. 30). In the District Court the Department of Labor returned to its studied ambiguity, threw doubt on its December 12, 1977 letter and appeared to be placing some unspecified degree of reliance on that investigation. In the Court [of Appeals] . . . the Government compounded the ambiguity of its earlier positions . . . with the new, meaningless and self-evident proposition that 'the report of the Canadian Government . . . did not affect the conclusions of the Department of Labor with respect to the United States portion of the investigation' (Brief 7, 37)." Finally, in this Court the Government simply seeks to evade the issue of the Canadian non-investigation by twice alleging (Opp. at 4, 7) that the Secretary "had no control" over its conduct,[2] and asserting the dif-

[2] This is disingenuous. Clearly, the Secretary, upon being informed of Tremblay's conflict of interest (J.A. 28), could have asked the Canadian Government for a new investigator instead of rejecting abruptly plaintiffs' information concerning Tremblay's conflict. Equally, if the Government were unable to obtain Canadian cooperation, the Secretary could have adopted petitioners' and one of his own investigators'

ferent (but equally meaningless) proposition that it "had not uncovered any evidence affecting the validity of his conclusions."

Yet, both the Government and USWA concede that Tremblay, who conducted the "investigation," is paid by USWA to arbitrate labor disputes (Gov't Brief in Court of Appeals at 26; USWA Opp. at 20-21, n. 11).[3] Nor do respondents deny any of petitioners' specific illustrations of the inadequacy and unfairness of Tremblay's proceedings. Neither respondent makes even a *pro forma* claim that the Canadian proceedings and report were adequate, fair or reliable.

If the Secretary relied on this Canadian "investigation," his decision was predicated on an unlawful investigation by a man in the pay of the Steelworkers and carried out under the dubious conditions described in our petition (at 11). If he did not so rely, then the Secretary made no investigation whatever of a substantial part of the election and his action is equally unlawful. The Government, in its opposition, simply attempts to evade this dilemma by refusing any clear factual evidence nor does it answer the legal defects of the Secretary's position.

LMRDA provides that "the Secretary *shall* investigate" union members' complaints. The Government fails to answer petitioners' contention that this mandatory duty was not properly fulfilled. Instead, it says in effect (Opp. at 7) that if the Secretary says he investigated, the members from whom an election has been stolen, and the reviewing courts, are bound by his *ipse dixit*. The

suggestion that plaintiffs' witnesses be brought to this country to give evidence which the union would then have been forced to rebut, see Pet. at 12-13, n. 9.

[3] The potential for gaining USWA goodwill here without disaffection of other parties in the labor disputes Tremblay arbitrates makes his conflict of interest obvious.

cited authority for this result is *Bachowski*, despite the fact that in that case the adequacy of the Secretary's investigation was never in question. Here, contrary to the *Bachowski* situation, the issue is whether the Secretary performed his mandated duty to make a full, reasonable and proper investigation, and whether petitioners may be denied judicial relief against the Secretary's failure to perform this mandated duty.

3. Frustration of the Statutory Intent

Bachowski established the principle that the judgment of the Secretary of Labor not to sue to redress violations of Title IV of LMRDA is subject to judicial relief. In defining the conditions of such relief, *Bachowski* assumed that in exercising his judgment the Secretary had made an investigation adequate for informed judgment. But given the deficient investigation here, the Secretary lacked the facts necessary for making an *informed* judgment. *Bachowski* assumed, moreover, that the Secretary was acting in his "role as lawyer for the complaining union member."[4] Yet here the Secretary has not only failed to carry out his duty as lawyer but denied the existence of such a duty and treated Sadlowski representatives with hostility, while simultaneously cooperating with USWA's Official Family. The Government does not deny this, but instead seeks to justify this treatment by citing the Secretary's "broad discretion" and by saying that his only "duty [is] to be impartial during the investigatory stage" (Opp. at 7). The Government cites no apposite authority for this result.[5] And

[4] This duty is the predicate for *Bachowski*'s requirement that the Secretary provide the complaining member with the reasons for a decision not to sue. 421 U.S. at 572.

[5] *Calhoon* v. *Harvey*, 379 U.S. 134 (1964) deals with the permissibility of pre-election lawsuits brought by individual

it ignores the legislative history establishing the duty—the statement of LMRDA's sponsor, Senator John Kennedy, that upon appeal to the Secretary "*Then* the Secretrary of Labor in effect becomes the union member's lawyer" (emphasis added) (Legis. Hist. of the LMRDA 1093).

Under these circumstances it is less than no answer to suggest, as USWA does (Opp. at 18), that petitioners should have sought a writ of mandamus against the Secretary during the investigation to improve its scope and reliability. Such an action, however, would have required knowledge of the full scope of the inadequacy of the Secretary's investigation at a time when the Secretary refused even to keep petitioners apprised of its progress. Moreover, it would have required the courts to entertain premature and unnecessary litigation. Union members who are deprived by the statute of their own right to sue to upset an unfair union election are entitled to real, not illusory remedies.

The net effect of the objections urged by respondents before this Court is that a default by the Secretary of Labor on his statutory duties leaves union members with no remedy for elections flawed by illegal misconduct. But when Congress enacted LMRDA, it was concerned that union officials would abuse their power, and "saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the

---

members, and *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477 (1968) holds that the Secretary's role in protecting the public interest is so vital that he cannot be limited to the allegations of the member's complaint but should have broad authority to investigate and bring actions to overturn elections. The Government's use of this decision as authority for treating complaining members with hostility and refusing to consider all their evidence is a sad commentary on its view of its LMRDA enforcement responsibilities.

regulation of union elections." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 531 (1972). It is "Title IV's special function in furthering the general goals of the LMRDA . . . to insure free and democratic union elections, the regulations of the union electoral process enacted in the Title having been regarded as necessary protections of the public interest as well as of the rights and interests of union members." *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 483 (1968).[6]

Contrary to the Congressional intent, the Secretary has defaulted on his duty to make a proper investigation, has failed to carry out his role as lawyer for the complaining union members, and has failed to give adequate reasons for refusing to sue. This Court's rulings in *Trbovich* and *Bachowski* established that the Secretary does not enjoy unlimited discretion in the enforcement of Title IV, but is subject to judicial correction. In refusing relief here, the lower courts permit the Labor

---

[6] This Court has many times recognized the importance ascribed by Congress to union democracy and the vital role of vigorous LMRDA enforcement for dissident union members and for the public interest. E.g., *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 482-83 (1968); *Wirtz* v. *Glass Bottle Blowers Ass'n*, 389 U.S. 463, 474 (1968) (referring to "the abuses surfaced by the extensive Congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions"); *Dunlop* v. *Bachowski*, 421 U.S. 560, 570-72 (1975) (" 'surely Congress must have intended that courts would intercede sufficiency to determine that the provisions of Title IV have been carried out in harmony with the implementation of other provisions of [the LMRDA]' "); *Wirtz* v. *Hotel, Motel & Club Employees Union*, 391 U.S. 492, 505-07 (1968) (noting that Congress had deliberately lightened the burden of demonstrating the effect of Title IV violations).

Department to frustrate the clear Congressional intent "to insure free and democratic union elections."

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
MARY M. LEVY

RAUH, SILARD AND LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

Attorneys for
Plaintiffs-Petitioners